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CONFIDENTIAL
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5584

DATE FILED: Oct. 25, 2004
DATE ACTIVATED: Sept. 13, 2005
DATE OF NOTIFICATION: None
LAST RESPONSE RECEIVED: None

EXPIRATION OF SOL: Oct. 2009

COMPLAINANTS:

Jack L. Metcalf and Frances Free

RESPONDENTS:

Unknown Respondents

RELEVANT STATUTES:

2 U.S.C. § 441d
11 C.F.R. § 100.26
11 C.F.R. § 100.28
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

MUR 5585

DATE FILED: Oct. 26, 2004
DATE ACTIVATED: Sept. 12, 2005
DATE OF NOTIFICATION: Nov. 2, 2004
LAST RESPONSE REC'D: Dec. 21, 2004

EXPIRATION OF SOL: Oct. 2009

COMPLAINANT:

James V. Lacy, General Counsel, Americans
for Fair Taxation

RESPONDENTS:

ITC Research; USA Public Opinion Group;
Mitchell Research & Communications, Inc.;
Steve Mitchell; SurveyUSA; Fred R.
Bierman; Nancy Pelosi; Democratic
Congressional Campaign Committee and
James J. Bonham, in his official capacity as
treasurer

RELEVANT STATUTES

2 U.S.C. § 441d
11 C.F.R. § 100.26
11 C.F.R. § 100.28
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INTERNAL REPORTS CHECKED:

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I. INTRODUCTION

These two matters (MUR 5584 and MUR 5585) concern telephone calls made to individuals residing in a number of Congressional districts across the country in October 2004. Although filed separately, the complaints in these two MURs appear to refer to a number of similar telephone calls. Therefore, we are recommending that the Commission merge the two matters and we have addressed them both in this General Counsel's Report.

The telephone calls that were the subject of the complaints in these matters were made prior to the November 2004 election, specifically mentioned the candidates for election in the districts where the calls were made, and discussed tax issues. No disclaimer or other attribution to any other entity, political committee or individual was stated on the calls.

Based on the complaints, as well as review of available information, we recommend that the Commission: (1) merge MUR 5584 and MUR 5585; (2) find reason to believe that unknown respondents violated 2 U.S.C. § 441d by placing the telephone calls without including a disclaimer; and (3) take no action at this time with respect to ITC Research; USA Public Opinion Group; Mitchell Research & Communications, Inc.; Steve Mitchell; SurveyUSA; Fred R. Bierman; Nancy Pelosi; and the Democratic

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Congressional Campaign Committee and James J. Bonham, in his official capacity as treasurer.

II. FACTUAL AND LEGAL ANALYSIS

A. The Calls in MUR 5584

Two individuals filed identical complaints in this matter. The complaints stated that telephone calls were being made in North Carolina that allegedly advocated the defeat of Representative Charles Taylor. According to the complainants, the calls in question stated that Rep. Taylor supported a national sales tax that "would force taxpayers to pay 'billions more in taxes' on clothing and food;" the calls then stated that Rep. Taylor's opponent, Patsy Keever, opposed that "unfair tax;" and, finally, the calls prompted the person to push a button to "indicate their support for Keever" and opposition to Rep. Taylor.¹ Complaints (MUR 5584).

~~The complaint does not make any allegation as to who made the calls, does not name any respondents, and there is no allegation that Ms. Keever or her campaign committee was involved. We do not know how many calls were made or to whom. We also do not know the time period in which these calls were made, but assume they were made approximately at the time the complaints were filed (October 2004).~~

B. The Calls in MUR 5585

The complaint in this matter was filed by an attorney on behalf of a group organized under 26 U.S.C. § 501(c)(4), "Americans for Fair Taxation" ("AFT"). AFT stated that a number of respondents have "produced and are in the process of producing millions of illegal telephone voter communications across the nation, shrouded as polling

¹ Patsy Keever was the challenger to Rep. Taylor in the 2004 North Carolina 11th District election for the House of Representatives. Rep. Taylor won the election with 55% of the vote.

1 questions, with the intention of defeating President George Bush and at least 28
2 Republican candidates for Congress " Complaint (MUR 5585), p. 1. The complaint
3 alleged that the calls did not contain appropriate or "clear and conspicuous" disclaimers
4 and further alleged that the respondents either made or paid for the calls, or conspired to
5 make the calls. Complaint (MUR 5585), p. 3. The complaint also alleged that the calls
6 are "funded by corporate, union, and otherwise illegal sources of money, which are not
7 being disclosed to the public." Complaint (MUR 5585), p. 1. Finally, the complaint
8 implied that whomever made the calls should be considered a political committee
9 because it made expenditures in excess of \$1,000 on public communications, and
10 therefore would be subject to the disclosure and filing requirements of the Federal
11 Election Campaign Act of 1971, as amended ("the Act"). Complaint (MUR 5585),
12 pp. 2-3.

13 The complaint named approximately ten individuals who received calls, listed
14 approximately thirty-nine districts in approximately twenty-one states where calls
15 allegedly were made, provided a purported transcription of two calls, and provided a
16 recording of one of those calls.² The calls for which we have transcriptions contain
17 similar language and themes, but were tailored to the Congressional district in which the
18 call was apparently made. For example, one call in Illinois stated:

19 Hello. This is USA Public Opinion Group with our one-question
20 Kentucky poll. President Bush is supporting a new national sales tax on
21 everything, including food and clothing. If this tax were to become law,
22 the middle class would pay billions more in taxes while losing all of their
23 deductions, including the home and mortgage deductions. In the race for
24 congress [sic], Tony Miller is opposed to the national sales tax because it
25 unfairly places the tax burden onto the middle class at a time when
26 families are struggling. Based on this information, press 1 if you would

² This recording can be made available for the Commission's review.

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1 vote for Tony Miller who is opposed to the national sales tax, or press 2 if
2 you would vote for Anne Northrup and the Bush economic plan
3

4 Complaint (MUR 5585), pp 7-8 A second call was similar but did not explicitly address
5 the issue of a national sales tax:

6 Hello, this is ITC Research with our one question Illinois poll. Last
7 week's federal economic reports indicated that the job market is tight,
8 wages are stagnant, and middle class families have to pay more for
9 everything from taxes, to healthcare, to college tuition. In the race for
10 Congress, Phil Crane supports the Bush economic plan. His opponent,
11 Melissa Bean supports a rollback of the Bush tax cuts. Based on this
12 information, press 1 if you would support Melissa Bean, who wants to
13 rollback tax breaks for the rich. Or, press 2 if you would support Phil
14 Crane who will continue the Bush economic plan.
15

16 Complaint (MUR 5585), p. 7.

17 C. The Allegations and the Law

18 The complaint in MUR 5584 alleged that unknown respondents did not include a
19 disclaimer on the calls. The complaint in MUR 5585 alleged that the respondents: did
20 not include an appropriate, clear and conspicuous disclaimer on the calls; accepted
21 money from corporations, unions, and other "illegal sources"; failed to register with the
22 Commission as a political committee; and/or conspired to do all of the above.

23 1. Disclaimers

24 The Act requires that political committees and individuals making certain
25 communications provide a disclaimer as specified in the statute and regulations. 2 U.S.C.
26 § 441d. A political committee "making a disbursement for the purpose of financing any
27 communication ... through any other type of general public political advertising" must
28 place a disclaimer in the communication. 2 U.S.C. § 441d. Furthermore, the regulations
29 state that any "public communication" for which a political committee makes a
30 disbursement must contain a disclaimer. 11 C.F.R. § 110.11. Finally, if the calls were

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1 paid for by a person other than a political committee, the calls must have contained a
2 disclaimer if the person made a disbursement for a communication that included express
3 advocacy or solicited a contribution through certain types of media or through general
4 public political advertising, or made a disbursement for an electioneering communication.
5 2 U.S.C. § 441d(a).

6 A public communication includes a communication by telephone bank to the
7 general public. 11 C.F.R. § 100.26. A telephone bank means that more than 500 calls of
8 an identical or substantially similar nature were made within a 30-day period. 11 C.F.R.
9 § 100.28. The Explanations and Justifications published after the effective date of the
10 2002 Bipartisan Campaign Reform Act ("BCRA") amendments to the Act also make
11 clear that a telephone bank is considered a type of general public political advertising.
12 See 67 Fed. Reg. 76962, 76963 (Dec. 13, 2002) ("each form of communication
13 specifically listed in the definition of 'public communication,' as well as each form of
14 communication listed with reference to a 'communication' in 2 U.S.C. 441d(a), must be a
15 form of 'general public political advertising.'"). Therefore, any candidate, political
16 committee or their agent(s) making any disbursement for telephone bank calls must
17 include a disclaimer on the calls.

18 At this time, it is unclear who or what entity paid for and made the calls.
19 Furthermore, with respect to the disclaimers here, we do not know whether more than
20 500 calls were made, but considering the number of districts claimed to have been
21 affected, it seems likely that more than 500 calls were made. In addition, although we do
22 not know whether all such calls were made within a 30-day period, because the
23 complaints were filed in mid- to late-October, again, it seems likely that the calls were

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made in September-October 2004 immediately preceding the November 2004 election.

Assuming all points to be true, if the calls were authorized or paid for by a political committee or its agent(s), then the calls should have included a disclaimer. 2 U.S.C. § 441d(a). Therefore, the question becomes who made the calls? The complaint in MUR 5585 named ITC Research and USA Public Opinion Group as respondents that expended funds and caused the phone calls to be made without a disclaimer. The complaint provides specific allegations, as well as factual support through the recorded and transcribed calls, that the entities making the calls used the names ITC Research and USA Public Opinion Group. However, we are unable to locate any accurate information regarding those two entities and are uncertain whether the entities actually exist at all.³

The phone call transcription in the complaint made clear that an entity called ITC Research is identified in the calls. The complaint also named as respondents Steve Mitchell and Mitchell Research & Communications ("Mitchell Research"). However, other than listing Mr. Mitchell and Mitchell Research as respondents and making the cursory statement that they have been "expending funds in violation of FECA by causing telephone bank public communications to occur without the required disclaimer and by failing to register with the Commission as a political committee," the complaint made no other reference to either. Complaint (MUR 5585), p. 4. The complaint provided virtually no details to support the allegations against Mr. Mitchell or Mitchell Research. It

³ In fact, USA Public Opinion Group was not provided notice of the complaint because we have been unable to locate any entity by that name. We attempted to provide notice of the complaint to ITC Research through Steve Mitchell because the complaint listed Mr. Mitchell as Chief Executive of ITC Research. However, as discussed *infra*, it appears that information is inaccurate.

1 vaguely attempted to tie Mr. Mitchell and Mitchell Research to ITC Research by stating,
2 without any support, that Steve Mitchell is Chief Executive of both ITC Research and
3 Mitchell Research, and that both ITC Research and Mitchell Research were located at the
4 same address in East Lansing, Michigan. However, in his response, Mr. Mitchell stated
5 that he has no knowledge of or connection to ITC Research or the calls made (*see*
6 Mitchell Response). In addition, our independent review of publicly available
7 information did not reveal any connection between ITC Research, on the one hand, and
8 Steve Mitchell or Mitchell Research, on the other hand. In fact, there is no evidence that
9 Steve Mitchell or Mitchell Research were involved in any way in making the calls, nor is
10 there any evidence that either was acting as or on behalf of ITC Research.

11 The complaint also named SurveyUSA and Fred Bierman as respondents. But,
12 again, other than naming SurveyUSA and Mr. Bierman and repeating the same cursory
13 statement about "expending funds in violation of FECA" cited above, the complaint
14 made no other reference to SurveyUSA or Mr. Bierman. Complaint (MUR 5585), p. 5.
15 The complaint did not make *any* specific allegations against Mr. Bierman or SurveyUSA
16 and did not reference any actions taken by either. Furthermore, Bierman's response, in
17 the form of a sworn affidavit, explicitly stated that he, SurveyUSA, SurveyUSA's parent
18 company Hypotenuse, and Hypotenuse's other affiliate (Voter Roll●Call) were not
19 involved in the calls described in the complaint and have no connection to USA Public
20 Opinion Group. SurveyUSA Response (Affidavit of Fred R. Bierman & SurveyUSA,
21 dated Dec. 15, 2004), pp. 1-3. Our independent research did not locate any information
22 to the contrary. Therefore, even if there is an entity called USA Public Opinion Group
23 that was involved in making the calls, there is no information that SurveyUSA or Mr.

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Bierman were involved nor is there any information that connects them to USA Public Opinion Group.

2 Political Committee Status and "Illegal" Sources of Money

The complaint also alleged that the respondents failed to file, or conspired to avoid filing, with the Commission as a political committee and that they accepted corporate, union or "otherwise illegal" money. Complaint (MUR 5585), p. 1. The Act defines a "political committee" as any committee, club, association or other group of persons that receives contributions or makes expenditures for the purpose of influencing a federal election that aggregate in excess of \$1,000 per calendar year. 2 U.S.C. § 431(4). An expenditure is any purchase, payment, distribution, or anything of value made by any person for the purpose of influencing any federal election. 2 U.S.C. § 431(9)(A). Furthermore, it is unlawful for a corporation or union to make contributions or expenditures in connection with any election in which Representatives for Congress are to be voted, or for a person to knowingly accept any such contributions. 2 U.S.C. § 441b(a).

At this time, we have no information at all regarding the identity of the party or parties responsible for the calls, no information regarding the purpose of that entity or entities, and only inferential information regarding the fact that it is likely that more than \$1,000 was spent to make the calls because more than 500 calls appear to have been made.

3. Coordination

1 The complaint also makes allegations that Representative Nancy Pelosi and the
2 Democratic Congressional Campaign Committee and James J. Bonham, in his official
3 capacity as treasurer ("DCCC") "conspire[ed]" . . . to cause telephone bank public
4 communications to occur without the required disclaimer and by conspiring to avoid
5 registration with the Commission of political committees, in order to influence the
6 election for President . . . and certain Democrat (sic) candidates to the United States
7 Congress." Complaint (MUR 5585), p. 5. Presumably, the complaint intends to allege
8 that Rep. Pelosi and the DCCC engaged in improper coordination with the entities that
9 authorized or paid for the calls.

10 Coordination under the Act means that actions were made in cooperation,
11 consultation or concert with or at the request or suggestion of a candidate, authorized
12 committee, political party committee, or any agent(s) thereof. A communication is a
13 ~~coordinated communication if it is paid for by a person other than a candidate, authorized~~
14 committee, political party committee, or agent(s) thereof and satisfies one of the four
15 "content" standards⁴ described in section 109.21(c) and one of the six "conduct"
16 standards⁵ described in section 109.21(d). 11 C.F.R. § 109.21.

⁴ In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004), the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004). The underlying decision was affirmed by a panel of the United States Court of Appeals, and the Commission's petition for rehearing *en banc* was recently denied. See *Shays v. FEC*, No. 40-5352 (July 15, 2005 and Oct. 21, 2005).

⁵ Briefly, the conduct standards include actions taken at the request or suggestion of a committee or candidate; material involvement by a committee or candidate; substantial discussion of the communication with a committee or candidate; use of a common vendor; payment for, or sharing of, information by a former employee or independent contractor of the committee or candidate; dissemination, distribution or republication of campaign material; or agreement or formal collaboration with a committee or candidate.

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1 The only facts alleged in the complaint as support for this allegation are that the
2 DCCC conducted a direct-mail campaign focused on "attacking Republican candidates
3 for Congress on the issue of the 'National Sales Tax' plan" and that the direct mail
4 campaign "focused on many of the districts that have received illegal telephone bank
5 calls." Complaint (MUR 5585), p. 10. The complaint also alleged that Rep. Pelosi
6 criticized the plan for a national sales tax orally and in writing, caused a report regarding
7 a national sales tax to be released by the staff of the House Ways and Means Committee,
8 and publicly stated "that she will use the National Sale Tax Plan as a tool to target several
9 Republican Congressional incumbents for defeat." Complaint (MUR 5585), pp. 10-11.

10 The information submitted in support of the complaint against the DCCC actually
11 demonstrates that the direct-mail ads sent by the DCCC *contain* a proper disclaimer.
12 Complaint, Ex. 3. The DCCC also provided an affidavit by its treasurer stating that the
13 ~~DCCC did not pay for the phone calls, nor did it engage the services of any other~~
14 respondent. DCCC Response, p. 3. The DCCC also stated that it "know[s] of no basis
15 whatsoever for any claim that the DCCC, or any agent of the DCCC, was involved in
16 these calls in any way." DCCC Response (Affidavit of James J. Bonham dated Dec. 20,
17 2004), p. 1. The DCCC further stated that no facts were alleged that, even if true, would
18 present a violation of the Act.

19 Rep. Pelosi's unsworn response made through her attorney argued that no facts
20 are alleged that, even if proven true, would present a violation of the Act. Rep. Pelosi
21 argued that the facts alleged simply demonstrate that she spoke out against a national
22 sales tax, and that she referenced the national sales tax as one of several issues that
23 Democrats would likely use to target Republicans in the election. Rep. Pelosi Response,

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p. 4. Rep. Pelosi further stated that an investigation would “raise the gravest First Amendment concerns” because the allegations are solely based on public comments she made. Rep. Pelosi Response, p. 5.

Here, it appears that the phone calls were public communications disseminated within 120 days of the election, discussed a clearly identified federal candidate, and were directed to voters in that candidate’s jurisdiction, thereby meeting one of the “content” standards. 11 C.F.R. § 109.21(c)(4). However, no specific allegations, much less facts, were provided to support the claim that either respondent engaged in any activity that would fit any of the “conduct” standards of acting in concert with any entity that might have authorized or paid for the calls. 11 C.F.R. § 109.21(d).

D. Recommended Actions

Based on the information provided in the complaint, the information supplied by the named respondents, and our own independent review of publicly available information, it appears a violation of section 441d may have occurred. The only entities that appear to have been involved with the calls are USA Public Opinion Group and ITC Research, but we have been unable to locate any information about either entity and they may not exist. Therefore, we recommend that the Commission find reason to believe that “unknown respondents” violated section 441d of the Act.

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3 We also recommend that, at this time, the Commission not make any findings as
4 to the remaining named respondents. Mr. Mitchell and Mitchell Communications argue
5 they are not involved, and Mr. Bierman and SurveyUSA claim this is a case of mistaken
6 identity. The DCCC and Rep. Pelosi argue that the complaint does not set forth a
7 sufficient factual basis to proceed against them. *See* MUR 4960 (Statement of Reasons);
8 MUR 5136; MUR 5141 (Statement of Reasons); MUR 5304. Here, we concur that the
allegations about these respondents appear to be speculative or based solely on facts that
might not constitute a violation of the Act (*e.g.*, making public statements in opposition
to the national sales tax or referring to the issue as being in contention during the
election).

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14 Therefore, instead of recommending that
15 the Commission find no reason to believe the remaining respondents violated the Act, in
16 an abundance of caution, we recommend that the Commission not take any action at this
17 time with respect to Mr. Mitchell, Mitchell Communications, Mr. Bierman, SurveyUSA,
18 the DCCC and James J. Bonham, in his official capacity as treasurer, and Rep. Pelosi.
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1 **III. PROPOSED INVESTIGATION**

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21 **IV. RECOMMENDATIONS**

22 1. Merge MUR 5584 and MUR 5585.

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24 2. Find reason to believe that unknown respondents violated 2 U.S.C.
25 § 441d.

- 3 Take no action at this time with respect to ITC Research; USA Public Opinion Group; Mitchell Research & Communications, Inc.; Steve Mitchell; SurveyUSA, Fred R Bierman; Hon. Nancy Pelosi; and Democratic Congressional Campaign Committee and James J. Bonham, in his official capacity as treasurer.
- 4 Approve the appropriate Factual and Legal Analyses.
- 5
- 6 Approve the appropriate letters.

Lawrence H. Norton
General Counsel

1/26/06
Date

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